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7                   Attorneys for Defendant  
8                   Juan Bravo Zambrano

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11                   **IN THE UNITED STATES DISTRICT COURT**  
12                   **FOR THE EASTERN DISTRICT OF WASHINGTON**  
13                   **(Honorable Edward F. Shea)**

14                   UNITED STATES OF AMERICA,                   ) NO. 4:15-cr-06049-EFS-19  
15    )  
16    ) Plaintiff,    )  
17    ) DEFENDANT'S MOTIONS *IN*  
18    ) *LIMINE*  
19    )  
20    )  
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31    )

TO: Clerk, U.S. District Court, Eastern District of Washington; and  
TO: Stephanie A. Van Marter, Assistant United States Attorney.

COMES NOW JUAN BRAVO ZAMBRANO by and through his attorney of record, Richard A. Smith of *Smith Law Firm*, and submits the following Motions *In Limine*, requesting that the following evidence be excluded from the Government's

1 case-in-chief at trial and that the court rule on the admissibility of these matters  
2 outside the presence of the jury:

3 **1. Opinion testimony by any person who has not been previously identified**  
4 **as an expert and who the Government has failed to previously provide**  
5 **discovery pursuant to FRCP 16(G).**

6 Federal Rule of Criminal Procedure 16(G) provides in part as follows:

7 G. Expert witnesses – At the defendant's request, the government  
8 must give to the defendant a written summary of any testimony that the  
9 government intends to use under Rule 702, 703, or 705 of the Federal  
10 Rules of Evidence during its case-in-chief at trial ...

11 The summary provided under this subparagraph must describe the  
12 witnesses' opinions, the basis and reasons for those opinions, and the  
13 witnesses' qualifications.

14 Mr. Bravo Zambrano requests the Court prohibit any opinion testimony by any person  
15 who has not previously been identified as an expert and/or who the Government has  
16 failed to provide discovery pursuant to FRCP 16(G).

17 **2. Any statement from law enforcement regarding evidence or statements**  
18 **alleged to be made by cooperating witnesses or confidential informants.**

19 Under the Sixth Amendment to the Constitution, the defendant has the right to  
20 confront all witnesses against him. All out of court statements by non-testifying  
21 individuals should therefore be excluded.

22 **3. The Government should be prohibited from producing at the time of trial**  
23 **any testimony, information or evidence alleging Mr. Bravo Zambrano**  
24 **manufactured marijuana or possessed methamphetamine on December 15,**  
25 **2016.**

1 Juan Bravo Zambrano is charged in the Second Superseding Indictment with  
 2 one count of violation of 21 U.S.C. § 841(a)(1), (b)(1)(A)(i), (ii)(I), (vi), and (viii); all  
 3 in violation of 21 U.S.C. § 846. Specifically that:

4  
 5 “Beginning on a date unknown but by or on about January 2010  
 6 continuing on or about December 6, 2016, in the Eastern District of  
 7 Washington and elsewhere the defendants ... including Juan Bravo  
 8 Zambrano did knowingly and intentionally combine, conspire,  
 9 confederate and agree together and with each other and other person,  
 10 both known and unknown to the Grand Jury, to commit the following  
 11 offense against the United States, to wit: distribution of 500 grams or  
 12 more of a mixture or substance containing a detectable amount of  
 13 Methamphetamine, 5 kilograms or more of a mixture or substance  
 14 containing a detectable amount of Cocaine, 1 kilograms or more of a  
 15 mixture or substance containing a detectable amount of heroin and 400  
 16 grams or more of a mixture or substance containing a detectable amount  
 17 of N-phenyl-N Propanamide, all Schedule II controlled substances, in  
 18 violation of 21 U.S.C. § 841 (a)(1), (b)(1)(A)(i), (ii)(I, (vi), and (viii);  
 19 all in violation of 21 U.S.C. § 846.”

20 On December 15, 2016 members of the FBI Eastern Washington Tri City Violent  
 21 Gang Safe Streets Task Force (“TCVGSSTF”) executed a search warrant at the  
 22 residence located at [REDACTED], Benton City,  
 23 Washington. At that time law enforcement seized what has been identified as, “a  
 24 marijuana grow”, approximately 7 grams of methamphetamine and a pellet gun,  
 25 Remington shotgun, Colt pistol and ammunition. This motion is made to prevent the  
 26 Government from producing those items at the time of trial.

27 In this case, evidence of a marijuana grow authorized under Washington state  
 28 law, user amounts of methamphetamine and the noted firearms are not relevant to the  
 29 charge in the Second Superseding Indictment or if minimally relevant are more  
 30 prejudicial than probative. FRE 401, 403.

1           Federal Rule of Evidence 404(b) prohibits evidence of prior crimes or bad acts  
2 merely to prove bad character.

3           Federal Rule of Evidence 404(b) prohibits evidence of prior crimes or bad acts  
4 merely to prove bad character, but does allow it to prove, “motive, opportunity, intent,  
5 preparation, plans, knowledge, identity or absence of mistake or accident.” Use of  
6 evidence pursuant to this rule, “must be narrowly circumscribed and limited” and,  
7 “may not be introduced unless the Government establishes its relevance to an actual  
8 issue in the case.” *United States v. Hodges*, 770 F.2d 1475, 1479 (9<sup>th</sup> Cir. 1985);  
9           *United States v. Garcia-Orozco*, 997 F.2d 1302 (9<sup>th</sup> Cir. 1993).

10           Recently, the Ninth Circuit restated a four part test for the application of  
11 Rule 404(b):

12           Evidence of prior criminal conduct may be admitted if:

13           (1) The evidence tends to prove a material point;  
14           (2) The prior act is not too remote in time;  
15           (3) The evidence is sufficient to support a finding that Defendant  
16           committed the other acts; and  
17           (4) In cases where knowledge and intent are at issue, the Act is  
18           similar to the offense charged.

19           *United States v. Garcia-Orozco*, 997 F.2d 1302 (9<sup>th</sup> Cir. 1993), citing, *United*  
20           *States v. Bibo-Rodriguez*, 992 F.2d 1398, 1400 (9<sup>th</sup> Cir.), cert. denied, 111 S. Ct. 2861  
21           (1991), 915 L.Ed.2d 1028 (1991).

22           Applying that test, this court has also stated that:

1       “... Extrinsic acts evidence is not looked upon with favor. We have  
 2       stated that our reluctance to sanction the use of evidence of other crimes  
 3       stems from the underlying premise of our criminal justice system, that  
 4       the defendant must be tried for what he did, not for who he is. Thus,  
 5       guilt or innocence of the accused must be established by evidence  
 6       relevant to the particular offense being tried, not by showing that the  
 7       defendant has engaged in other acts of wrongdoing.”

8       *United States v. Bradley*, 5 F.3d 1317, 1320 (9<sup>th</sup> Cir. 1993).

9       With respect the relevance requirement, the first prong of the four part test, the  
 10      Government, “must articulate precisely the evidential hypothesis by which a fact of  
 11      consequence may be inferred from the other act evidence.” *United States v.*  
 12      *Mehrmanesh*, 689 F.2d 822, 830 (9<sup>th</sup> Cir. 1982). When the Government’s theory is  
 13      one of knowledge, the court has emphasized that the Government must prove a logical  
 14      connection between the knowledge gained as a result of the commission of the prior  
 15      act and the knowledge at issue in the charged act. *United States v. Hernandez-*  
 16      *Miranda*, 601 F.2d 1104 (9<sup>th</sup> Cir. 1979).

17  
 18       In the case of *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 2012 (9<sup>th</sup> Cir.  
 19       1995), the Ninth Circuit reversed the District Court because it allowed the prosecution  
 20       to put on evidence of the defendant’s drug use and possession of meth “to prove that  
 21       he conspired to possess ... hydraulic acid with knowledge that it would be used to  
 22       manufacture methamphetamine.” 66 F.3d at 1009.

23  
 24       In holding that ruling to be reversible error the *Vizcarra-Martinez* court  
 25       explained that, “The prosecution would encounter little difficulty in presenting the  
 26       evidence relevant to its case against the defense ... without offering into evidence the  
 27       defendant’s personal drug use”. *Id* at 1013.

1           In the present case, approximately 7 grams of methamphetamine was located at  
 2 the defendant's residence. No other evidence was located to support that the  
 3 methamphetamine was possessed with intent to deliver. So too with the marijuana  
 4 being grown at the residence. The charges in the Second Superseding Indictment have  
 5 nothing to do with the manufacture or sale of marijuana. Moreover, the marijuana  
 6 grow was authorized pursuant to state law. See Exhibit A.  
 7

8           4. **Rule 403.**  
 9

10           Rule 403 provides that relevant evidence may be excluded "if its probative  
 11 value is substantially outweighed by danger of ... unfair prejudice, confusion of the  
 12 issues, misleading the jury, undue delay, a waste of time, or needlessly presenting  
 13 cumulative evidence". The District Court must apply the 403 test anytime it allows  
 14 the admission of Rule 404(b) into evidence. *United States v. Mayans*, 17 F.3d 1174,  
 15 1183 (9<sup>th</sup> Cir. 1994); see also *United States v. Curtin*, 489 F.3d 935, 958 (9<sup>th</sup> Cir.  
 16 2007) (we hold as a matter of law that a court does not properly exercise its balancing  
 17 discretion under Rule 403 when it fails to place on the scales and personally examine  
 18 and evaluate all that it must weigh). (Emphasis in the original.)  
 19

20           If the trial court were to find that any of the above items could be admitted  
 21 pursuant to FRE 404(b) the court must also determine whether the evidence satisfies  
 22 Rule 403, i.e. "the court must decide whether the probative value is substantially  
 23 outweighed by the prejudicial impact under Rule 403". *United States v. Chea*, 231  
 24 F.3d 531, 534 (9<sup>th</sup> Cir. 2000). See also *United States v. DeGeorge*, 380 F.3d 1203,  
 25 1220 (9<sup>th</sup> Cir. 2004). In this case, the Defense submits that even if the court were to  
 26 find the evidence admissible under FRE 404(b) it should be prohibited pursuant to  
 27 FRE 403.  
 28

1       5. **The Court should prohibit the introduction by the Government of**  
 2       **statements made by Co-Defendants to law enforcement or others.**

3           The Government has withheld, if they exist, statements made by co-defendants  
 4           to law enforcement at the time or after their arrest. Under the Sixth Amendment to the  
 5           United States Constitution, the defendant has the right to confront all witnesses  
 6           against him. Should there exist co-defendant statements and the co-defendant  
 7           exercises their right to remain silent at trial, the defendant would be unable to question  
 8           or cross-examine the incriminating statements that co-defendants have made against  
 9           him. Accordingly, Mr. Bravo Zambrano ask that these statements be provided to  
 10           Defense Counsel and so that Defense Counsel can properly address whether the  
 11           statements must be excluded from any trial against him. See, *Bruton v. United States*,  
 12           391 U.S. 123 (1968).

15       6. **The Court should prohibit statements made by any indicted or unindicted**  
 16       **co-conspirators which directly or indirectly refer to Juan Bravo Zambrano**  
 17       **or which otherwise might be used to incriminate Mr. Bravo Zambrano or**  
 18       **other alleged co-conspirators.**

19           This motion is made pursuant to FRE 801(d)(2)(E).

20           Statements of co-conspirators are admissible if they were made “by the parties  
 21           co-conspirator during and in furtherance of the conspiracy”.

23           Mr. Bravo Zambrano objects to the admission of any statement alleged to be  
 24           made against him or implicating him under the co-conspirator rule until it is  
 25           determined that any proposed statement meets the requirements of FRE 801(d)(2).  
 26           The Defendant objects to admissions of statements against him under the co-  
 27           conspirator hearsay rule if (1) the statements are idle chatter or otherwise cannot be  
 28           regarded in furtherance of a conspiracy; (2) made before the conspiracy was formed or

1 after the conspiracy ended; (3) was made by a co-conspirator to law enforcement  
2 before and after the arrest of the maker of the statement; and (4) if the statement is  
3 self-serving by accomplices and potential conspirators who are receiving benefits or  
4 consideration in exchange for their testimony against Mr. Bravo Zambrano. Such  
5 statements are inherently unreliable and must be tested and excluded under FRE 403.  
6

7. **Mr. Bravo Zambrano requests that the Government be required to present**  
8 **all statements it intends to introduce under FRE 801(d)(2)(E) at or before**  
9 **the pre-trial conference so that the court can determine their admissibility**  
10 **outside of the presence of the jury.**

11. **Testifying witnesses should be excluded from the courtroom under FRE**  
12 **615.**

13 The Defendant requests that all witnesses be excluded from the courtroom until  
14 they are excused from service, pursuant to FRE 615. Should the law enforcement  
15 agent chosen by the Government to sit at counsel's table during the trial be a  
16 percipient witness, the Defendant would ask that case agent's testimony be taken first,  
17 so as not to violate the spirit of FRE 615. See *United States v. Valencia-Riascos*, 696  
18 F.3d 938 (9<sup>th</sup> Cir. 2012) ("good practice to require case agent witnesses to testify  
19 first").  
20

21. **Leave to file additional motions *in limine*.**  
22

23 The Defense hereby reserves the right to file additional motions *in limine*  
24 should the need arise prior to the trial.  
25

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1 DATED this 6th day of February, 2018.  
2  
3

4 Presented by: *Smith Law Firm*  
5  
6

7 /s/ RICHARD A. SMITH  
8 RICHARD A. SMITH, WSBA 15127  
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15 CERTIFICATE OF SERVICE  
16  
17

18 I hereby certify under penalty of perjury of the laws of the State of Washington  
19 that on February 6, 2018, I electronically filed the foregoing with the Clerk of the  
20 Court using the CM/ECF System which will send notification of such filing to the  
21 following:  
22  
23

24 Stephanie A. Van Marter, Assistant United States Attorney.  
25  
26

27 /s/ Lugene M. Borba  
28 LUGENE M. BORBA  
29  
30  
31